

NO. 22-55872

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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DR. MAHENDRA AMIN, M.D.,

PLAINTIFF-APPELLEE,

v.

DON WINSLOW,

DEFENDANT- APPELLANT

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On Appeal from the United States District Court  
District for Southern California  
No. 21-cv-1635-L-BGS

Hon. M. James Lorenz, Senior District Judge

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**BRIEF OF AMICUS CURIAE THE ELECTRONIC FRONTIER  
FOUNDATION IN SUPPORT  
OF DEFENDANT-APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: January 20, 2023

By: /s/ Aaron Mackey  
Aaron Mackey

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST OF AMICUS.....	1
INTRODUCTION.....	1
ARGUMENT .....	2
I.    TWITTER USERS EXPECT HYPERBOLE AND TO READ MORE THAN A SINGLE TWEET.....	2
A.    Twitter is a rough-and-tumble online platform for hyperbolic speech. ....	3
B.    Twitter users read short tweets in the context of the platform’s hyperbole and its features like feeds, retweets, and hashtags. ....	8
1.    Twitter’s specific features .....	8
2.    Twitter users’ expectations.....	14
II.   TWITTER IS A PUBLIC JOURNAL FOR PURPOSES OF CALIFORNIA’S FAIR REPORT PRIVILEGE. ....	15
A.    Many users rely on Twitter as their source of news. ....	16
B.    Twitter exercises its First Amendment right to moderate content on its service, just like traditional media. ....	18
CONCLUSION .....	20
CERTIFICATE OF COMPLIANCE .....	21
CERTIFICATE OF SERVICE.....	22

## TABLE OF AUTHORITIES

### Cases

<i>Biro v. Conde Nast</i> , 883 F. Supp. 2d 441 (S.D.N.Y. 2012).....	7
<i>Chau v. Lewis</i> , 771 F.3d 118 (2d Cir. 2014).....	7
<i>Colt v. Freedom Commc’ns, Inc.</i> , 109 Cal.App.4th 1551 (2003) .....	16
<i>Ferlauto v. Hamsher</i> , 74 Cal.App.4th 1394 (1999) .....	6
<i>Ganske v. Mensch</i> , 480 F. Supp. 3d 542 (S.D.N.Y. 2020).....	4, 6, 14, 15
<i>Global Telemedia Intern., Inc. v. Doe I</i> , 132 F. Supp. 2d 1261 (C.D. Cal. 2001) .....	3, 7, 9, 15
<i>Highfields Cap. Mgmt., L.P. v. Doe</i> , 385 F. Supp. 2d 969 (N.D. Cal. 2005) .....	7, 8
<i>Hurley v. Irish-Am. Gay, Lesbian &amp; Bisexual Grp. of Boston</i> , 515 U.S. 557 (1995).....	19
<i>Hustler Mag., Inc. v. Falwell</i> , 485 U.S. 46 (1988).....	6
<i>Janus v. American Federation of State, County, &amp; Municipal Employees, Council 31</i> , 138 S. Ct. 2448 (2018).....	19
<i>Los Angeles v. Preferred Commc’ns, Inc.</i> , 476 U.S. 488 (1986).....	18
<i>Manhattan Cmty. Access Corp. v. Halleck</i> , 139 S. Ct. 1921 (2019).....	18, 19
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n</i> , 138 S. Ct. 1719 (2018).....	19
<i>Miami Herald Publ’g Co. v. Tornillo</i> , 418 U.S. 241 (1974).....	18
<i>N.Y. Times v. Sullivan</i> , 376 U.S. 254 (1964).....	6

<i>Nat’l Inst. of Family &amp; Life Advocates v. Becerra</i> , 138 S. Ct. 2361 (2018).....	19
<i>NetChoice, LLC v. Att’y Gen. of Florida</i> , 34 F.4th 1196 (11th Cir. 2022) .....	19
<i>Old Dominion Branch No. 496 v. Austin</i> , 418 U.S. 264 (1974).....	6
<i>Packingham v. North Carolina</i> , 137 S.Ct. 1730 (2017).....	3
<i>Underwager v. Channel 9 Australia</i> , 69 F.3d 361 (9th Cir. 1995) .....	3, 8
<i>United States v. Sierra Pac. Indus., Inc.</i> , 862 F.3d 1157 (9th Cir. 2017) .....	16
<i>USA Tech., Inc. v. Doe</i> , 713 F. Supp. 2d 901 (N.D. Cal. 2010) .....	15
<b>Statutes</b>	
Ca. Code Civ. P. § 47(d).....	2, 16
<b>Other Authorities</b>	
@dannygonzalez (Jan. 16, 2017) .....	15
@DojaCat (Dec. 3, 2022) .....	4
@DrOz (June 28, 2022).....	13
@elonmusk (Dec. 20, 2022).....	4
@JohnFetterman (June 28, 2022).....	13
@MerriamWebster (Jan. 16, 2017) .....	15
@mobarnews (Dec. 20, 2022).....	14
@Sifill_ (Nov. 16, 2022).....	11
@Wendys (Dec. 19, 2022) .....	4
@ZoeTillman (Jan. 13, 2023).....	18
<i>A Brief History Of Twitter’s 140-Character Limit</i> , Fast Company (May 24, 2016).....	9
<i>A year-long joke: the ‘never-ending’ Twitter chain</i> , BBC News (Jan. 21, 2015).....	12

*About different types of Tweets*, Twitter Help Center .....11

Aliza Rozen and Ikuhiro Ihara, *Giving you more characters to express yourself*,  
Twitter Blog (Sept. 26, 2017) .....9

Amy Mitchell, Elisa Shearer, and Galen Stocking, *News on Twitter: Consumed by  
Most Users and Trusted by Many*, Pew Research Center (Nov. 15, 2021) .....17

Andrew Mercier, *The 2022 state of journalism on Twitter*, Muck Rack Blog  
(May 18, 2022).....18

Anita Butler and Alberto Parrella, *Tweeting with consideration*, Twitter Blog  
(May 5, 2021).....6

Dalvin Brown, *19 million tweets later: A look at #MeToo a year after the hashtag  
went viral*, USA Today (Oct. 13, 2018).....5

Danny Yadron, *Why do normal people struggle with Twitter?*, The Guardian  
(Feb. 18, 2016).....10

Elisa Shearer, *More than eight-in-ten Americans get news from digital devices*,  
Pew Research Center (Jan. 12, 2021) .....17

Hayley Dorney, *How to create and use hashtags*, Twitter Business .....13

*How many people come to Twitter for news? As it turns out a LOT*, Twitter News  
(Sept. 12, 2021).....17

*How Many Words Are 280 Characters?*, Number of Words. ....9

*How to create a thread on Twitter*, Twitter Help Center .....10

*How to Retweet*, Twitter Help Center.....11

*Investor Relations*, Twitter, Inc. ....3

Jack Morse, *‘Game of Thrones’ sets new record by conquering your Twitter feed*,  
Mashable (April 29, 2019).....13

Joseph Burgo, *Why shame is good*, Vox (Apr. 18, 2019) .....5

Kitty Knowles, *What the heck is . . . Rickrolling*, Fortune (Feb. 2, 2016) .....12

Marvin Ammori, *The New York Times: Free Speech Lawyering in the Age of  
Google and Twitter*, 127 Harv. L. Rev. 2259 (2014).....16

Melanie Mason, *The mean tweets are coming from inside the House. Study of  
politicians’ Twitter looks at ‘civility,’* Los Angeles Times (April 28, 2022) .....6

*RickRoll*, Know Your Meme .....12

Sam Bestvater, Sono Shah, Gonzalo Rivero, and Aaron Smith, *Politics on Twitter: One-Third of Tweets From U.S. Adults Are Political*, Pew Research Center (June 16, 2022).....4

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Sneha Alexander, *What drives the toxicity on Twitter?*, Mint (Mar. 5, 2020) .....5

*Yes Yes No, Reply All*.....14

Zach Schonfeld, *Musk says Twitter character limit will increase to 4,000*, The Hill (Dec. 12, 2022) .....10

## STATEMENT OF INTEREST OF AMICUS<sup>1</sup>

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization with more than 39,000 dues-paying members that has worked for 30 years to ensure that technology supports freedom, justice, and innovation for all people of the world. EFF ensures that users’ interests are presented to courts considering crucial online free speech issues, including their right to transmit and receive information online. As part of its legal advocacy, EFF routinely files *amicus curiae* briefs with state and federal appellate courts to explain technology and the internet. *See hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1183 (9th Cir. 2022) (explaining digital technology such as Internet Protocol address blocking, web scraping, and code-based access restrictions).

### INTRODUCTION

The district court’s decision encourages meritless lawsuits against online speakers by allowing plaintiffs to strip disputed statements of their context and evade California’s robust anti-SLAPP statute. Yet the First Amendment requires courts to examine the fuller context of any alleged actionable statement to protect hyperbole and avoid chilling speakers. That fuller context in this case means the

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), amicus certify that no person or entity, other than amicus curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

district court should have recognized that Twitter, where Mr. Winslow spoke about Dr. Mahendra Amin, is perhaps one of the most caustic forums on the internet. Twitter users know and expect that people will say awful things about others, and that users heatedly opine about the news.

Moreover, Twitter users speak in short bursts of 280 characters or less, often rapidly firing off multiple tweets on the same topic all the while referencing other users' tweets, news articles, and other media. Twitter users expect this and know that generally, no single tweet contains the full story. Users know that they often will need to read multiple tweets from other users or otherwise try to learn more about any conversation occurring on Twitter.

Yet Twitter is also a major platform for the dissemination of news, and so is a public journal under California Civil Code section 47(d). Indeed, Twitter users' ability to easily share news stories or short bulletins via tweets is often the catalyst for much of the commentary on the site. In that way, Twitter serves as a public journal that publishes news that users communicate about. Finally, Twitter exercises editorial discretion just as any other publisher.

## **ARGUMENT**

### **I. TWITTER USERS EXPECT HYPERBOLE AND TO READ MORE THAN A SINGLE TWEET.**

By focusing on the single tweet containing a disputed statement in this defamation case, the district court missed the forest for the trees. But courts

determining whether speech constitutes opinion or hyperbole protected by the First Amendment and California’s anti-SLAPP statute apply the totality of the circumstances test—which includes the disputed statement’s context. *See Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995).

The district court erroneously ignored the broader context of internet speech generally and Twitter’s features and its users’ expectations specifically. *See id.*

**A. Twitter is a rough-and-tumble online platform for hyperbolic speech.**

Internet users’ speech is largely sardonic, heavy on opinion, and almost universally infected with hyperbole. The internet offers everyone with access an essential space “for the exchange of views.” *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017). Users exchange views through online intermediaries like Twitter, comment sections of websites, and other interactive forums that are generally open for anyone to join. Many of these forums have always been unmoderated and allow “on-going, free-wheeling and highly animated” exchanges about a variety of topics. *See Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001).

Indeed, Twitter’s mission “is to give everyone the power to create and share ideas and information instantly without barriers.” *Investor Relations*, Twitter, Inc.<sup>2</sup>

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<sup>2</sup> <https://investor.twitterinc.com/contact/faq/default.aspx>.

“Twitter’s forum is equally — if not more — informal and freewheeling” than other online forums. *Ganske v. Mensch*, 480 F. Supp. 3d 542, 553 (S.D.N.Y. 2020). Pew Research survey data show that a large percentage of U.S. adults who use Twitter do so to express opinions, mostly about politics. Sam Bestvater, Sono Shah, Gonzalo Rivero, and Aaron Smith, *Politics on Twitter: One-Third of Tweets From U.S. Adults Are Political*, Pew Research Center (June 16, 2022).<sup>3</sup> The same report found that 67 percent of high-volume Twitter users said they use the platform to express their own opinions. *Id.*

For better or worse—but protected by the First Amendment all the same—Twitter is an irreverent and hyperbolic place. Some of the most popular tweets, with tens of thousands of likes, are simple quips like “idk shut up.” @DojaCat (Dec. 3, 2022).<sup>4</sup> Twitter’s CEO, who plans to resign because of a poll he posted on the platform, recently tweeted that the people vying for his job are “foolish.” @elonmusk (Dec. 20, 2022).<sup>5</sup> Wendy’s, the fast-food chain, parodied Elon Musk with a poll to its 3.9 million followers asking whether it should lead Twitter next. @Wendys (Dec. 19, 2022).<sup>6</sup> Twitter users often opine against controversial figures,

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<sup>3</sup> <https://www.pewresearch.org/politics/2022/06/16/politics-on-twitter-one-third-of-tweets-from-u-s-adults-are-political/>.

<sup>4</sup> “[I]dk” is shorthand for “I don’t know.”

<https://twitter.com/DojaCat/status/1599251899366379520>.

<sup>5</sup> <https://twitter.com/elonmusk/status/1605372724800393216>.

<sup>6</sup> <https://twitter.com/Wendys/status/1604865566057144320>.

especially if, like Mr. Winslow, they have many followers. Many survivors of sexual harassment, including celebrities, for example, have used the hashtag #metoo on Twitter and scrutinized alleged and confirmed perpetrators of sexual violence. Dalvin Brown, *19 million tweets later: A look at #MeToo a year after the hashtag went viral*, USA Today (Oct. 13, 2018).<sup>7</sup> People may disagree about whether this is self-empowerment or problematic shaming—regardless, the First Amendment provides ample breathing room to ensure robust debate on these controversial topics. *See also* Joseph Burgo, *Why shame is good*, Vox (Apr. 18, 2019).<sup>8</sup>

One study found that roughly 25 percent of tweets addressing elected officials “contained offensive language, expletives, and other insults such as ‘idiot,’ stupid, ‘moron,’ ‘traitor,’ and ‘loser.’” Sneha Alexander, *What drives the toxicity on Twitter?*, Mint (Mar. 5, 2020).<sup>9</sup> Elected officials themselves use hyperbole on Twitter. For example, in 2019, Rep. Kevin Hern (R-Okla.) accused another politician of “endorsing infanticide & proudly doing it!” *See* Melanie Mason, *The mean tweets are coming from inside the House. Study of politicians’*

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<sup>7</sup> <https://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002/>.

<sup>8</sup> <https://www.vox.com/first-person/2019/4/18/18308346/shame-toxic-productive>.

<sup>9</sup> <https://www.livemint.com/technology/tech-news/what-drives-the-toxicity-on-twitter-11583413426706.html>.

*Twitter looks at 'civility,'* Los Angeles Times (April 28, 2022).<sup>10</sup> Unfortunately, slurs targeting peoples' race, sexuality, gender identity, religious beliefs, and heritage are common on Twitter, with researchers finding they have increased significantly in recent months. Sheera Frankel and Kate Conger, *Hate Speech's Rise on Twitter is Unprecedented, Researchers Find*, The New York Times (Dec. 2, 2022).<sup>11</sup> See also Anita Butler and Alberto Parrella, *Tweeting with consideration*, Twitter Blog (May 5, 2021) (announcing a feature that asks users to reconsider tweets that contain what Twitter deems to be harmful or offensive language).<sup>12</sup>

Courts must consider that online forums like Twitter are often the place for “vehement, caustic, and sometimes unpleasantly sharp attacks.” See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). So, when Twitter users call each other harsh things, like “traitor,” that is an opinion, not capable of being true or false. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284 (1974); see *Ferlauto v. Hamsher*, 74 Cal.App.4th 1394, 1401 (1999) (“language used ‘in a loose, figurative sense’ have all been accorded constitutional protection”); *Ganske*, 480 F. Supp. 3d at 553-54

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<sup>10</sup> <https://www.latimes.com/politics/story/2022-04-28/twitter-incivility-up-among-members-of-congress-study-finds>.

<sup>11</sup> <https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html>.

<sup>12</sup> [https://blog.twitter.com/en\\_us/topics/product/2021/tweeting-with-consideration](https://blog.twitter.com/en_us/topics/product/2021/tweeting-with-consideration).

(calling another Twitter user “xenophobic” was opinion); *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 463 (S.D.N.Y. 2012) (holding that “shyster” and “con man” is rhetorical hyperbole that is understood to be statement of opinion); *Chau v. Lewis*, 771 F.3d 118, 129 (2d Cir. 2014) (“‘sucker,’ ‘fool,’ ‘frontman,’ ‘industrial waste,’ ... and ‘crooks or morons’ ... are hyperbole and therefore not actionable opinion”).

Thus, the “general tenor, the setting and format” of tweets can “strongly suggest that the postings are opinion.” *Global Telemedia*, 132 F. Supp. 2d at 1267. Over two decades ago, *Global Telemedia* described online forums with a range of “relatively straightforward commentary to personal invective ... to the simply bizarre.” *Id.* at 1264. That is still true for most services today, including Twitter. The forum at issue was the “Raging Bull Message Boards,” part of a financial website. *Id.* The court highlighted one exchange as an example of users’ opinionated and bizarre invective. One user posted to another: “you are one of the stupidest suckers that ever posted here.” *Id.* The targeted user replied: “that means so much coming from a degenerate who speaks regularly from his lower orifice.” *Id.*

More generally, conversations on Twitter and online forums “cover a huge range” of opinions with “an ample and obvious sense of irreverence.” *See Highfields Cap. Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 973 (N.D. Cal. 2005). *Highfields* involved a Yahoo! message board where, as in *Global Telemedia*,

“[m]any of the messages are crude, indecent, or transparently laughable,” that many “include misspellings, grammatical errors, and/or incomplete thoughts and sentences.” *Id.* The court went on: “Messages on this board reflect considerable venting, much tongue-in-cheek, [and] little pretense at sophistication or thoughtfulness.” *Id.*

**B. Twitter users read short tweets in the context of the platform’s hyperbole and its features like feeds, retweets, and hashtags.**

Unlike the District Court, Twitter users would not view Mr. Winslow’s tweet in isolation and would also not expect his post, including use of terms like butcher and criminal, to be literally asserting facts. Rather, users would understand Mr. Winslow’s post to be common—and perhaps even mild, by Twitter’s standards—hyperbole that is a feature of the service and incapable of defamatory meaning. And if users had questions about any specific tweet by Mr. Winslow, they would click through to his profile to view other tweets to understand the broader context. *See* Appellant’s Opening Brief (“AOB”) 22-47. Thus, in addition to understanding the general, opinion-heavy context of online speech, courts must also analyze “the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation.” *Underwager*, 69 F.3d at 366.

**1. Twitter’s specific features**

Twitter has several distinctive features that can encourage users to express

protected opinions or hyperbole. They include:

**Character limits for each post:** Every Twitter post (known as a tweet) is capped at 280 characters, which includes any spaces between words. Aliza Rozen and Ikuhiro Ihara, *Giving you more characters to express yourself*, Twitter Blog (Sept. 26, 2017) (“*Giving you more*”).<sup>13</sup> The character limit means that, in English, most tweets are limited to 40 to 70 words—a handful of sentences at most. *See How Many Words Are 280 Characters?*, Number of Words.<sup>14</sup> Before 2017, Twitter limited tweets to 140 characters. *See Giving you more*. The 140-character limit was a legacy of Twitter’s 2006 launch. Users could post via cellphone text messages, which were capped at 160 characters (Twitter saved 20 of the 160 characters of a text message for the person’s username). *See A Brief History Of Twitter’s 140-Character Limit*, Fast Company (May 24, 2016).<sup>15</sup> Twitter’s character limit reinforces “hyperbole, invective, and short-hand phrases” by enabling commentary that is long on opinion and short on facts. *See Global Telemedia*, 132 F. Supp. 2d at 1267.<sup>16</sup>

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<sup>13</sup> [https://blog.twitter.com/en\\_us/topics/product/2017/Giving-you-more-characters-to-express-yourself](https://blog.twitter.com/en_us/topics/product/2017/Giving-you-more-characters-to-express-yourself).

<sup>14</sup> <https://numberofwords.com/character-count/280-characters/> (last visited Dec. 19, 2022).

<sup>15</sup> <https://www.fastcompany.com/3060165/a-brief-history-of-twitters-140-character-limit>.

<sup>16</sup> Although Twitter announced a plan to increase the character limits for each tweet in the future, the tweets at issue in this case were limited to 280 characters. *See*

**Users often post multiple tweets on a single topic:** Twitter recognizes that “[s]ometimes, we need more than one tweet to express ourselves.” *How to create a thread on Twitter*, Twitter Help Center.<sup>17</sup> Threading allows a Twitter user to string together a longer narrative by responding to their own earlier tweets. *Id.* But not all users posting multiple tweets on the same topic create threads, and many do not because, until recently, it was difficult for users not steeped in Twitter’s protocols to properly thread their tweets. See Danny Yadron, *Why do normal people struggle with Twitter?*, The Guardian (Feb. 18, 2016) (describing how Twitter can be difficult for new users because its interfaces “are closer to a programmers’ internet chat than a platform to share baby pictures”).<sup>18</sup> To understand the longer narrative, Twitter users who see a single tweet on a topic will often click on the user’s profile to view their other tweets.

**Twitter Feed and Retweets:** Most Twitter users scroll through a feed of tweets by other users they have followed. The feed includes “retweets” of users they do not follow by users they do follow. If User A follows User B but not User C, User A will still see any of User C’s tweets that User B retweets. See *How to*

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Zach Schonfeld, *Musk says Twitter character limit will increase to 4,000*, The Hill (Dec. 12, 2022), <https://thehill.com/policy/technology/3771542-musk-says-twitter-character-account-will-increase-to-4000/>.

<sup>17</sup> <https://help.twitter.com/en/using-twitter/create-a-thread> (last visited Dec. 19, 2022).

<sup>18</sup> <https://www.theguardian.com/technology/2016/feb/18/twitter-problems-jack-dorsey-silicon-valley-technology>.

*Retweet*, Twitter Help Center.<sup>19</sup> The District Court appeared to be concerned that more than 9,000 people retweeted Mr. Winslow’s disputed statement, allowing other users who do not follow him to hear his opinions. *See* 1-ER-8. But all Twitter users, including those non-followers who viewed Mr. Winslow’s tweet, know this feature exposes them to new people and views because every user’s feed often includes tweets from people they do not follow. This is a feature, not a bug, of Twitter’s design. Further, those users who did not follow Mr. Winslow would know that they need to click through to Mr. Winslow’s profile to understand the surrounding commentary. *See* AOB 31-32.

**The Quote Tweet:** Twitter allows users to not only reply to, but also to build on top of a post by quoting it. *See About different types of Tweets*, Twitter Help Center.<sup>20</sup> For example, former NAACP Legal Defense Fund President Sherrilyn Ifill used a Quote Tweet to add her opinions on top of a C-SPAN tweet of video coverage of a congressional hearing on allegations against the ICE facility in which Dr. Amin worked. Ifill “quoted” this tweet and expressed disgrace for “a doctor who sounds like he walked out of a horror movie.” @SIfill\_ (Nov. 16, 2022).<sup>21</sup> Similarly, Mr. Winslow Quote-Tweeted a post asking whether “‘pro-life’

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<sup>19</sup> <https://help.twitter.com/en/using-twitter/how-to-retweet>.

<sup>20</sup> <https://help.twitter.com/en/using-twitter/types-of-tweets> (last visited Dec. 21, 2022).

<sup>21</sup> [https://twitter.com/SIfill\\_/status/1592918411763679232](https://twitter.com/SIfill_/status/1592918411763679232).

Republicans” would investigate the ICE facility, adding that this was an “Important tweet. Important question.” 2-ER-132. Sometimes, people use the Quote Tweet feature to communicate about the feature itself and Twitter’s irreverent nature. For example, users can chain Quote Tweets on top of one another, creating an endless series of tweets. *See A year-long joke: the ‘never-ending’ Twitter chain*, BBC News (Jan. 21, 2015).<sup>22</sup> The Quote Tweets sometime lead nowhere or execute one of the internet’s oldest pranks, the RickRoll. A RickRoll is a bait-and-switch that directs users to click on a link supposedly about a given topic but instead leads to the music video for Rick Astley’s 1987 dance-pop hit, “Never Gonna Give You Up.” *See RickRoll, Know Your Meme*;<sup>23</sup> Kitty Knowles, *What the heck is . . . Rickrolling*, Fortune (Feb. 2, 2016).<sup>24</sup>

**Twitter Displays Snippets of Conversations:** Isolated tweets in a feed do not show the full conversation occurring between other users. This means that a user may only see a reply to an earlier tweet in their feed and must click through to see the earlier tweet and the entire exchange. For example, a user following then-candidate Pennsylvania Sen. John Fetterman may have seen his reply tweet to his opponent, Dr. Mehmet Oz, of a dictionary definition of the word “clown.”

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<sup>22</sup> <https://www.bbc.com/news/blogs-trending-30904601>.

<sup>23</sup> <https://knowyourmeme.com/memes/rickroll> (last visited Dec. 21, 2022).

<sup>24</sup> <https://www.forbes.com/sites/kittyknowles/2016/02/02/rickrolling-what-is-rick-rolling-rick-astley/?sh=6cbf41c02ff2>.

@JohnFetterman (June 28, 2022).<sup>25</sup> The tweet in isolation is obviously a response, but if the user was not following Dr. Oz, they would not know what prompted it. Upon clicking through Sen. Fetterman’s reply, however, the user would see Dr. Oz’s original tweet of a purported dictionary definition of Fetterman that stated he is a “Bernie Sanders Socialist to the Left of Joe Biden.” @DrOz (June 28, 2022).<sup>26</sup> The user would only fully understand the exchange by seeing both tweets.

**The hashtag:** This shorthand is a primary way users interact with content on Twitter. To add a hashtag to a tweet, users add a hash symbol (#) before a word, or a phrase that contains no spaces between words. *See* Hayley Dorney, *How to create and use hashtags*, Twitter Business.<sup>27</sup> The hashtag then links that tweet to all other tweets with the same hashtag. *Id.* This allows anyone to view all the linked content by searching for the hashtag on Twitter. One of the most popular ways to use hashtags is to join conversations about real-time events. For example, in 2019, almost 8 million people used a hashtag to discuss a climactic Game of Thrones episode, the “Battle of Winterfell,” as it aired on HBO. Jack Morse, ‘*Game of Thrones*’ sets new record by conquering your Twitter feed, Mashable (April 29, 2019).<sup>28</sup> As Mr. Winslow describes, other Twitter users created hashtags

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<sup>25</sup> <https://twitter.com/JohnFetterman/status/1541849055567007745?>

<sup>26</sup> <https://twitter.com/DrOz/status/1541841056387547137>.

<sup>27</sup> <https://business.twitter.com/en/blog/how-to-create-and-use-hashtags.html> (last visited Dec. 20, 2022).

<sup>28</sup> <https://mashable.com/article/game-of-thrones-twitter-record>.

such as #MassHysterectomies, #DrMahendraAmin, and #UterusCollector, to discuss the whistleblower allegations about the ICE facility and Dr. Amin. *See* AOB 25-26. People also use hashtags to find relevant information. For example, the Missouri Bar regularly includes the hashtag #MOLawyers in its tweets, which makes them easier to find by bar members who may have missed the announcements elsewhere. *See, e.g., @mobarnews* (Dec. 20, 2022).<sup>29</sup>

## 2. Twitter users' expectations

Given Twitter's features described above, users of the service reasonably expect shorthand and know that they must do some further work, like click on replies or hashtags, or look at the tweeter's profile, to comprehend a tweet's role in a larger conversation. This process can take time. One podcast created a segment that peeled back the various layers of references, hashtags, and meaning in particularly mystifying tweets. *See Yes Yes No, Reply All*.<sup>30</sup>

Twitter users also expect these features, especially the character limit, to cause frequent and hyperbolic responses and interjections from other users. In *Ganske*, for example, the defendant “came across the conversation” between the plaintiff and another person. 480 F. Supp. 3d at 547. The defendant then “interjected herself” into that conversation and tweeted her non-defamatory

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<sup>29</sup> <https://twitter.com/mobarnews/status/1605307394678046721>.

<sup>30</sup> <https://gimletmedia.com/tags/8gu9/yes-yes-no>.

opinions. *Id.* Merriam-Webster dictionary’s Twitter account is often irreverent in its replies to users, such as one who demanded that the dictionary add “funner” as a recognized word. @dannygonzalez (Jan. 16, 2017).<sup>31</sup> Merriam-Webster’s account replied with a link to its definition for “funner,” and asked, “Why don’t you look words up before complaining to the dictionary?” @MerriamWebster (Jan. 16, 2017).<sup>32</sup>

The sheer volume of hyperbole on Twitter can be at times overwhelming, but that is all the more reason why reasonable users expect that others deploy colorful language to speak their opinions, not to make factual assertions, particularly as part of larger commentary. *See USA Tech., Inc. v. Doe*, 713 F. Supp. 2d 901, 908-09 (N.D. Cal. 2010) (holding online statement calling plaintiff’s CEO a “known liar” was not capable of defamatory meaning); *see Global Telemedia Intern., Inc.*, 132 F. Supp. 2d at 1267 (statement that company is a “sinking ship” is opinion).

## **II. TWITTER IS A PUBLIC JOURNAL FOR PURPOSES OF CALIFORNIA’S FAIR REPORT PRIVILEGE.**

Although Twitter is a hotbed for opinion and caustic exchanges, many of those interactions are in response to news reporting that Twitter allows its users to publish. While Twitter is uniquely hyperbolic, it contains both news content and

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<sup>31</sup> <https://twitter.com/dannygonzalez/status/821242757859590144>.

<sup>32</sup> <https://twitter.com/MerriamWebster/status/821256645904842752>.

opinion, just like newspapers, television, radio, and every other medium that disseminates information to the broader public. And as Mr. Winslow demonstrates, California’s fair report privilege, Ca. Code Civ. P. § 47(d), has always applied to mediums that include opinion content. *See* AOB 50-53. The District Court thus erred in holding that Twitter is not a public journal for purposes of California’s fair report privilege. *See also Colt v. Freedom Commc’ns, Inc.*, 109 Cal.App.4th 1551, 1555 (2003) (applying Ca. Code Civ. P. § 47(d) to statements published in a newspaper and “on an associated message board”); *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1174 (9th Cir. 2017) (recognizing Twitter’s role as a “news and social networking service”). *Amicus* writes separately to emphasize how Twitter is a leading source of news and opinion for many people and the service exercises the same editorial discretion, protected by the First Amendment, as more traditional media.

**A. Many users rely on Twitter as their source of news.**

“The numbers suggest that companies like Google and Twitter have at least as great an impact on free expression as do traditional newspapers.” Marvin Ammori, *The New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 Harv. L. Rev. 2259, 2266 (2014). Pew researchers found that nearly seven in ten Twitter users get their news from the site. Amy Mitchell, Elisa Shearer, and Galen Stocking, *News on Twitter: Consumed by Most Users and*

*Trusted by Many*, Pew Research Center (Nov. 15, 2021).<sup>33</sup> More generally, they found that more than eight out of ten people get their news from digital devices and online sources. Elisa Shearer, *More than eight-in-ten Americans get news from digital devices*, Pew Research Center (Jan. 12, 2021).<sup>34</sup> Of those who get their news from a device, 53 percent get their news from social media services like Twitter. *Id.*

Journalists regularly disseminate their reporting on Twitter. One survey from 2021 found that 83 percent of journalists between 18-29 years old use Twitter as a primary place to publish their work. *How many people come to Twitter for news? As it turns out a LOT*, Twitter News (Sept. 12, 2021).<sup>35</sup> CNN's breaking news account has 61 million followers and is one of the most popular accounts on the service.<sup>36</sup> Rachel Maddow, the MSNBC anchor, has more than 10 million Twitter followers,<sup>37</sup> while CNN's Anderson Cooper has more than 9 million.<sup>38</sup> *See generally* Andrew Mercier, *The 2022 state of journalism on Twitter*, Muck Rack

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<sup>33</sup> <https://www.pewresearch.org/journalism/2021/11/15/news-on-twitter-consumed-by-most-users-and-trusted-by-many/>.

<sup>34</sup> <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>.

<sup>35</sup> [https://blog.twitter.com/en\\_us/topics/insights/2022/how-many-people-come-twitter-for-news](https://blog.twitter.com/en_us/topics/insights/2022/how-many-people-come-twitter-for-news).

<sup>36</sup> @CNN, <https://twitter.com/CNN>.

<sup>37</sup> @maddow, <https://twitter.com/maddow>.

<sup>38</sup> @andersoncooper, <https://twitter.com/andersoncooper>.

Blog (May 18, 2022).<sup>39</sup>

Further, many journalists publish news directly on to Twitter for users to consume in 280-character bites. For example, Bloomberg courtroom reporter Zoe Tillman regularly disseminates court documents or images of them to her more than 173,000 followers. *See, e.g., @ZoeTillman* (Jan. 13, 2023).<sup>40</sup>

**B. Twitter exercises its First Amendment right to moderate content on its service, just like traditional media.**

Twitter has a First Amendment right to moderate its users' content. The First Amendment protects Twitter's right to do so regardless of whether courts characterize it as a micro-blogging service, as the District Court did. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974); *cf. Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (reaffirming that "when a private entity provides a forum for speech," "[t]he private entity may . . . exercise editorial discretion over the speech and speakers in the forum"). *See also Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986).

Courts have applied the First Amendment right to make editorial decisions to any entity that speaks by curating the speech of others, not just traditional print newspaper publishers. The Supreme Court recently and repeatedly reaffirmed this

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<sup>39</sup> <https://muckrack.com/blog/2022/05/18/2022-state-of-journalism-on-twitter>.

<sup>40</sup> <https://twitter.com/ZoeTillman/status/1613992875473178629?s=20&t=hBYBF2s3oedNprF5YfpUMg>.

broad right. See *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928; *Janus v. Am. Fed'n of State, Cnty., & Mun. Emp., Council 31*, 138 S. Ct. 2448, 2463 (2018); *Nat'l Inst. of Family & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371 (2018). See also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). As the Supreme Court explained in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–70 (1995), “a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.” *Id.* The Eleventh Circuit recently joined the many other federal courts that protect social media companies’ right to moderate their users’ posts. *NetChoice, LLC v. Att’y Gen. of Florida*, 34 F.4th 1196, 1213 (11th Cir. 2022). “Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups.” *Id.*

Considering the above, Twitter is a public journal because it publishes news and exercises its First Amendment right to decide what content it hosts on their service, just like any other public journal.

## CONCLUSION

For the reasons stated above, this Court should reverse the decisions below and grant Mr. Winslow's motion to strike.

Dated: January 20, 2023

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify as follows:

1. This Brief of Amicus Curiae the Electronic Frontier Foundation in Support of Defendant-Appellant and Reversal complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,150 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, in 14-point font in Times New Roman font.

Dated: January 20, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 20, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 20, 2023

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